

**UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K STREET, NW
WASHINGTON, DC 20001-8002**

DATE: 09/25/96

CASE NO. 95-INA-81

In the Matter of:

KAJIMA ENGINEERING & CONSTRUCTION, INC.
Employer

on behalf of

MAMORU MIYAJIMA
Alien

Before: Guill, Vittone, and Wood
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and the employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On January 20, 1993, Kajima Engineering & Construction, Inc. ("Employer") filed an application for labor certification to enable Mamoru Miyajima ("Alien") to fill the position of "Estimator Project" (AF 55). The job duties for the position, as stated on the application, are as follows:

In conjunction with management employee shall provide estimated service and material costs to be integrated in bid preparation. Employee shall calculate

material and service costs, prepare budgets, contract administration, construction management and material procurement to ensure construction to specifications at optimum cost.

(AF 55).

The stated job requirements for the position, are as follows: a 2-year college education with an AA degree in Civil Engineering; and two years of experience in the job offered or 2 years of experience in the related occupation of Civil Engineering. Other special requirements include: "Experience or Academic work" in Estimating, Budget Administration, Cost and Budget Management, as well as Road and Structures (AF 55).

According to the report of recruitment results, the Employer considered 16 applicants and all were rejected (AF 61).

In a Notice of Findings ("NOF") issued on December 16, 1993, the CO proposed to deny certification on the grounds, inter alia, that the Employer had rejected qualified U.S. applicants for other than lawful job-related reasons (AF 46-53).

The Employer submitted its rebuttal on or about March 17, 1994 (AF 10-33). The CO found the rebuttal unpersuasive and issued a Final Determination on June 16, 1994, denying certification (AF 4-9).

On July 20, 1994, the Employer requested that the Board of Alien Labor Certification Appeals "reconsider" the denial of certification (AF 2-3). The CO denied the "Request for Reconsideration" and subsequently forwarded this matter to the Board of Alien Labor Certification Appeals for review.

Discussion

In the Notice of Findings, the CO listed three seemingly qualified U.S. applicants, and directed the Employer to document its basis for rejecting them. Although the CO accepted Employer's rebuttal regarding one of the three applicants, rejection of the remaining two U.S. applicants was also cited in the Final Determination as grounds for denial of certification.

Upon review of the resumes of the two named U.S. applicants, we find that both appear likely to meet the stated job requirements (**See** Narain Hazari: AF 63; Bob Valley Palejwala: AF 63-64). Yet, both were apparently rejected without an interview (AF 61).

Since the Employer asserts, on rebuttal, that it attempted to contact U.S. applicant Bob Valley Palejwala (DX 17), for the purpose of rendering a decision herein, our focus will be on the Employer's summary rejection of U.S. applicant Narain Hazari.

In the report of recruitment results, the Employer purports to have rejected Mr. Hazari because he has no experience with Budget Administration or with Roads and Structures (AF 61).

Yet, as stated by the CO in the Notice of Findings (AF 52), Mr. Hazari's resume shows that he has a B.S. in Civil Engineering and approximately 20 years experience as an estimator, planner and project manager (AF 52,63).

In rebuttal, the counsel on behalf of the Employer stated, in pertinent part, that Employer's President reviewed Mr. Hazari's resume and he "was deemed unqualified on the face of his resume." (AF 18). In so finding, Employer's counsel cited the U.S. applicant's brief summary of his background and the nature of the business activity of Mr. Hazari's current employer, as well as some of his prior employers. Employer's counsel noted that, as part of his summary of work experience, Mr. Hazari stated: "Prepared estimates for subcontractors for painting, wallcovering, drywall and acoustic tile ceiling for office hotels...bridges...nuclear power plants." Employer's counsel stated: "Bridges do not utilize any of these types of construction." Moreover, although the Employer acknowledged that Mr. Hazari included "bridges" on his resume, Employer contends that the correct "term of art" is "roads and structures." Therefore, Employer surmised that bridges "refer to pedestrian walkways." In addition, Employer's counsel stated that the summary of Mr. Hazari's background included the types of jobs suggestive of "a very low level of duties on minor products." (AF 18). Furthermore, Employer's counsel noted that several of the U.S. applicant's employers are "involved in commercial and residential projects," while others are "dedicated to the design of power plants," not roads and structures (AF 18). Accordingly, Employer, through its counsel, stated: "Mr. Hazari is not qualified, his employers do not perform the work which would provide estimating of roads and structures, and nothing in Mr. Hazari's resume indicates that he is qualified." (AF 19).

The CO found Employer's rebuttal inadequate. He stated, in pertinent part:

The employer acknowledges that he (Mr. Hazari) was not contacted and provides a detailed discussion of the basis for finding him not qualified by resume alone...

We disagree that bridges are not painted. However, the awkward wording of a paragraph in the resume does not provide sufficient basis to deem the applicant unqualified without contacting the applicant...

Next, we are not persuaded by the employer's bare assertion that the use of the term "bridges" refers only to pedestrian walkways even though the employer believes that "roads and structures" is "term of art."

Next, the employer's discussion in the rebuttal is bold because it draws conclusions about the extent of the projects of the five most recent employers listed on the resume with no evidence to support the opinion that the work of each company is so limited. Even if the employer knows a company to specialize in a particular

area, it is not clear that the employer has comprehensive knowledge that the (sic) each never builds roads or structures. Moreover, the four employers listed on the resume for the period from 1962 to 1980 are ignored by the employer's discussion.

For all of these reasons we are not persuaded by the employer's conclusion on the basis of resume review alone that this applicant has never had the opportunity to work in roads or structures. Moreover, we are not persuaded that he did not perform the duties of an estimator which the employer describes by using the term budget, or even that he lacks work in budget and cost administration.

It appears that there has been a lack of good faith attempt to recruit an applicant who is likely to be qualified, and the employer has not provided documentation sufficient to show that the applicant lacks the stated experience requirements. Thus he is not found to have been lawfully rejected.

(AF 7-8). We agree.

Our review of Mr. Hazari's resume indicates that, at the very least, there is a reasonable possibility that he is qualified for the position. Thus, the Employer clearly bears the burden of further investigating the applicant's credentials. Gorchev & Gorchev Graphic Design, 89-INA-118 (Nov. 29, 1990) (en banc); St. Barbara's RC Church, 93-INA-48 (June 7, 1994). In so finding, we reiterate that Mr. Hazari has a B.S. degree in Civil Engineering and approximately 20 years of experience as an estimator, project manager, and engineer, and note that his background and experience appears to be far more extensive than that of the Alien prior to his hiring by the Employer (**Compare** AF 63,123-124). Therefore, we find that labor certification was properly denied.¹

¹Although not the basis for our decision herein, we also note that the purported rationale for the summary rejection of Mr. Hazari (**i.e.**, no experience with Budget Administration and Roads and Structures) begs the question of whether the U.S. applicant meets the alternative "other special requirement" of "academic work" in those areas (AF 55). In light of Mr. Hazari's B.S. degree in Civil Engineering, it is quite possible that his education included courses in those areas.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the Direction of the panel by:

Todd R. Smyth
Secretary to the Board of Alien Labor
Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.